United Nations AT/DEC

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1199

Case No. 1156: OBINY Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Omer Yousif Bireedo; Mr. Spyridon Flogaitis;

Whereas, on 13 June 2003, Philip Ogutu Obiny, a former staff member of the United Nations, filed an Application in which he requested, in accordance with article 12 of the Statute of the Tribunal, the revision of Judgement No. 1045 rendered by the Tribunal on 23 July 2002;

Whereas in his Application the Applicant requested the Tribunal, inter alia [to order]:

> "1. ... [R]escission of the contested administrative decision and cause the Applicant to be paid compensation for the injury suffered as a result of [the] arbitrary termination and victimisation due to his role as chairman of Staff Association.
>
> 2. Reinstatement of [the A]pplicant in United Nations service from 1st January 1997 with all benefits until date of reinstatement ...
>
> ...
>
> 4. ... [R]emoval of all ... documents which were fabricated and confidential from the [A]pplicant's personal file ...
>
> 5. ... [R]evision of content and substance of [J]udgement number 1045, which is flawed by errors of omission."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 8 December 2003;

Whereas the Respondent filed his Answer on 5 November 2003;

Whereas the Applicant filed Written Observations on 8 December 2003;

Whereas on 28 October 2004, the Applicant submitted an additional communication;

Whereas the facts in the case were set forth in Judgement No. 1045.

Whereas the Applicant's principal contentions are:

1. The amount paid by the Respondent, in accordance with the JAB's recommendation of nine month's net base salary, was paid at the rate in effect at the time of payment, i.e., November 2000. The compensation of twelve months net base pay at the rate in effect at the time of separation (November 1996), which was awarded by the Tribunal in Judgement No. 1045, would be about half the compensation that was already paid by the Secretary-General. The intention of the Tribunal cannot be read to mean negative compensation.

2. The Tribunal erred in not ordering the rescission of the contested decision. In failing to order the Applicant's reinstatement, the Tribunal has sustained an administrative decision and action which do not have a basis.

3. Article 12 of the Tribunal's Statute recognizes that errors of omission are serious enough to cause effect to revisions of its Judgements. Omissions are not limited to missing typographic, clause or paragraph in judgements but extend to issues and policies that may have been overlooked or disregarded.

Whereas the Respondent's principal contention is:

The Applicant failed to introduce any fact of a decisive nature, which was unknown to the Tribunal and to the Applicant at the time Judgement No. 1045 was rendered, and, accordingly, his request for a revision of the Judgement is without merit.

The Tribunal, having deliberated from 4 to 24 November 2004, now pronounces the following Judgement:

I. The Applicant is seeking revision of Judgement No. 1045, *Obiny*, of 23 July 2002. He requests the Tribunal to order the Respondent to reinstate him in service and to pay him compensation for "the injury suffered as a result of [the] arbitrary

termination and victimization due to his role as chairman of [the] Staff Association". The Applicant claims that the content and substance of Judgement 1045 is "flawed by errors of omission" and should therefore be revised.

II. Article 12 of the Statute stipulates the circumstances under which a judgement may be revised, as follows:

> "The Secretary-General or the applicant may apply to the Tribunal for a revision of a judgement on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence. The Application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement Clerical or arithmetical mistakes in judgements, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Tribunal either of its own motion or on the application of any of the parties."

The first circumstance which is recognized as one warranting the revision of a judgement is the discovery of a new fact by one of the parties. This is qualified by the requirements that the newly discovered fact must be one that is sufficiently important so as to have affected the Tribunal's decision and that it was unknown to the discovering party and to the Tribunal at the time of rendering the judgement.

The second circumstance for revision of a judgement is when the Tribunal recognizes that a mistake had occurred in its judgement. This includes clerical or arithmetic mistakes as well as accidental slip or omission. In Judgement No. 896 *Baccouche* (1998) the Tribunal held that

> "Applications for correction of clerical mistakes have no other purpose than to amend such mistakes in the text of a judgement. In fact, such mistakes may be typographical or arithmetical (affecting, for example, the amount of compensation) or they may result from an accidental slip or omission. *The point at issue always relates to a defect in the drafting of the judgement and never to its substance*, i.e. to possible unawareness on the part of the Tribunal of facts or applicable rules." (Emphasis added.)

III. In Judgement No. 1045, the Tribunal ruled that the Respondent's decision not to extend the Applicant's fixed-term contract was tainted by arbitrariness and lack of due process and that the Applicant was victimized because of his involvement with the UNDP Staff Association. Accordingly, the Tribunal ordered the Respondent to pay the Applicant "compensation of twelve months' net base salary at the rate in effect on the date of his separation from service, less the amount already paid by the Secretary-

General". In his request for revision, the Applicant points to the fact that the compensation as ordered by the Tribunal, because it was to be paid "at the rate in effect on the date of his separation from service", ultimately leads to a negative compensation. In numerical values, the amount to be paid to him in accordance with the Tribunal's order was Ksh. 717,369.96, whereas the amount already paid to him by the Secretary-General in November 2000, based on the recommendation of the JAB, was Ksh. 902,278.00, yielding a negative compensation of Ksh. 184,908.04.

IV. It is clear that the Tribunal's intention in Judgement 1045 cannot be read to mean negative compensation. The Tribunal had increased the compensation to be awarded to the Applicant from nine to twelve months' net base salary. However, it was not aware of the depreciation in the local currency or of the increase in salaries, which had taken place between the time of the Applicant's separation from service and the time of the payment of compensation by the Respondent. In this regard, the Tribunal has previously stated in its Judgement No. 972: *Abdulhadi*, (2000), that:

> "the operative part of the judgement relating to the value of the salary at the time of separation cannot be interpreted in a manner likely to cause financial loss to the Applicant, since this would be a contradiction in terms."

Likewise in the Applicant's case, the Tribunal's order should not be construed as intended to cause the Applicant financial loss. The Tribunal, following *Baccouche* (*ibid.*), views the Order in Judgement 1045 as one that includes an accidental mistake in the drafting which should be corrected. In the Tribunal's view, the appropriate redress in this case would be to award the Applicant the additional three months' net base salary, which the Tribunal originally intended to grant him as compensation, payable at the same rate as the compensation already paid to him by the Secretary-General in November 2000.

V. The Applicant raises additional claims in his Application. However, the Tribunal finds that as regards those other claims, he did not meet the criteria of article 12 but rather, the Applicant attempted to re-open issues already decided upon by the Tribunal in Judgement No. 1045 and which are therefore *res judicata*. The Tribunal refers to article 11, sub-paragraph 2 of its Statute which states that "[s]ubject to the provisions of article 12, the judgements of the Tribunal shall be final and without appeal". In its Judgement No. 1055, *Al-Jassani* (2002) the Tribunal stated:

"VII. 'No party may seek revision of the judgement merely because that party is dissatisfied with the pronouncement of the Tribunal and wants to have a second round of litigation.' (Judgement No. 894, *Mansour* (1998), para. II.) Yet the Applications in these cases are in reality a restatement of the claims asserted by the Applicant. No one should believe that a mere restatement of claims, even though made in new language and with changed emphasis, can be a basis for the revision of a Judgement made by the Tribunal. As stated in [(Judgement No. 556, *Coulibaly* (1992)], a revision is not a means of reopening issues that have been settled definitively and which are thus *res judicata*. See also *Baccouche*, [(*ibid.*)] in which the Tribunal explained that an application for a revision must not be confused with an appeal, since the Tribunal's judgements are final and not subject to appeal."

VI. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation equivalent to three months' net base salary, to be paid at the same rate as the compensation paid to him in November 2000; and,

2. Rejects all other pleas.

(*Signatures*)

Julio **Barboza**
President

Omer Yousif **Bireedo**
Member

Spyridon **Flogaitis**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary